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11 UNITED STATES DISTRICT COURT  
12 DISTRICT OF NEVADA  
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14 UNITED STATES OF AMERICA, ) 3:01-cr-00177-HDM-VPC  
15 Plaintiff, )  
16 vs. ) ORDER  
17 WAYNE SIMPSON, )  
18 Defendant. )  
19 \_\_\_\_\_ )

20 Defendant moves for a reduction of sentence pursuant to 18  
21 U.S.C. § 3582(c)(2) (#49). The government has opposed (#53, #55),  
22 and the defendant has replied (#56).

23 Section 3582(c)(2) provides that where a defendant "has been  
24 sentenced to a term of imprisonment based on a sentencing range  
25 that has subsequently been lowered by the Sentencing Commission . .  
26 . the court may reduce the term of imprisonment . . . if such a  
27 reduction is consistent with applicable policy statements issued by  
28 the Sentencing Commission." United States Sentencing Guidelines

1 ("U.S.S.G.") § 1B1.10(a)(2) provides:

2 [a] reduction in the defendant's term of imprisonment is  
3 not consistent with this policy statement and therefore  
4 is not authorized under 18 U.S.C. § 3582(c)(2) if . . .  
5 (A) none of the amendments listed in subsection (c) is  
6 applicable to the defendant; or (B) an amendment listed  
7 in subsection (c) does not have the effect of lowering  
8 the defendant's applicable guideline range.

9 Defendant asserts that he is eligible for relief based on  
10 Amendment 748, which modified the sentencing ranges for crack  
11 cocaine offenses. Amendment 748, however, was merely a temporary,  
12 emergency amendment. (U.S.S.G., 2010 Supp. to App. C, Am. 748).  
13 On April 6, 2011, Amendment 748 was re-promulgated as permanent and  
14 designated as Amendment 750. On June 30, 2011, the United States  
15 Sentencing Commission ("Sentencing Commission") voted to make parts  
16 A and C of Amendment 750 retroactively applicable, thus allowing  
17 eligible defendants to move for reductions of sentence pursuant to  
18 § 3582(c)(2). In light of this history and the intent of  
19 defendant's motion, the court construes defendant's motion as  
20 seeking relief under Amendment 750, rather than Amendment 748.

21 Amendment 750 effectively decreased the sentencing ranges for  
22 offenses involving crack cocaine by, in relevant part, amending the  
23 drug quantity table in U.S.S.G. § 2D1.1. Amendment 750 is also  
24 listed in § 1B1.10(c), making it appropriate for retroactive  
25 application. But while the defendant was convicted of an offense  
26 involving crack cocaine, he was also determined to be a career  
27 offender. As such, defendant's sentence was based on § 4B1.1, the  
28 guideline provision for career offenders, not on § 2D1.1. See  
*United States v. Wesson*, 583 F.3d 728, 731 (9th Cir. 2009) ("[A]  
drug offense sentence that is 'based on' a sentencing range  
calculated under U.S.S.G. § 4B1.1 because the defendant was a

1 career offender cannot have been 'based on' a sentencing range  
2 calculated under the § 2D1.1 drug amount table. The two sentencing  
3 schemes are mutually exclusive."). Amendment 750 had no impact on  
4 § 4B1.1. Amendment 750 therefore did not lower defendant's  
5 sentencing range and does not apply to his sentence. (See Memo  
6 dated May 20, 2011, from Off. of Research & Data & Off. of Gen.  
7 Counsel to Chair Saris, Comm'rs, & Judith Shoen, p. 12, available  
8 at [http://www.ussc.gov/Research/Retroactivity\\_Analyses/Fair\\_](http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf)  
9 [Sentencing\\_Act/20110520\\_Crack\\_Retroactivity\\_Analysis.pdf](http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf) (removing  
10 from an analysis of the impact of retroactive application of the  
11 crack cocaine amendment offenders originally sentenced pursuant to  
12 the career offender and armed career offender provisions, U.S.S.G.  
13 § 4B1.1 & § 4B1.4, because "their guidelines range would continue  
14 to be controlled by these provisions and would not change")). For  
15 that reason, a reduction in defendant's term of imprisonment is not  
16 authorized by 18 U.S.C. § 3582(c)(2) and would not be consistent  
17 with the Sentencing Commission's policy statement set forth in  
18 U.S.S.G. § 1B1.10(a)(2).

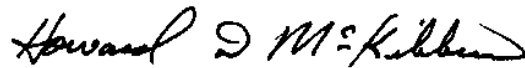
19 Defendant argues that he is nonetheless eligible for relief  
20 because his sentencing range under § 4B1.1 was based on the  
21 statutory maximum for his crack cocaine offense and the Fair  
22 Sentencing Act reduced the statutory penalties for crack cocaine  
23 offenses. This argument is without merit. No retroactively  
24 applicable changes to the career offender guideline have been made  
25 in response to the Fair Sentencing Act, and therefore defendant is  
26 not eligible for relief under § 3582(c)(2). Putting aside the  
27 specific requirements to be eligible for § 3582(c)(2) relief,  
28 defendant's argument also fails on a more general level. Even

1 though the statutory maximums for crack cocaine offenses have in  
2 many cases been lowered, the Fair Sentencing Act does not  
3 retroactively apply to a defendant sentenced before the date it was  
4 enacted. *United States v. Baptist*, 646 F.3d 1225, 1227-29 (9th  
5 Cir. 2011). Thus, the court cannot apply the current statutory  
6 maximums retroactively to calculate a sentence under § 4B1.1 for a  
7 defendant who was sentenced before the Fair Sentencing Act was  
8 enacted.<sup>1</sup>

9 Defendant is not eligible for relief under 18 U.S.C. §  
10 3582(c)(2). The defendant's motion for reduction of sentence  
11 (#49) is therefore **DENIED**. The defendant's motion for judicial  
12 notice (#52) is also **DENIED**.

13 **IT IS SO ORDERED.**

14 DATED: This 8th day of November, 2011.

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16 UNITED STATES DISTRICT JUDGE  
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25 <sup>1</sup>In connection with this argument, the defendant has filed a motion for  
26 judicial notice under Federal Rule of Evidence 201 (#52). Although it is  
27 not entirely clear, the document sought to be judicially noticed appears to  
28 be a legal brief arguing for retroactive application of the Fair Sentencing  
Act, Pub. L. No. 111-220, 124 Stat. 2372. As noted above, the Ninth Circuit  
has rejected this argument. Accordingly, because the document defendant  
seeks judicial notice of provides no support for his motion for reduction  
of sentence, the motion for judicial notice (#52) should be denied.